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No. 96-320

In the Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

Given the policies informing the FELA and the common law, what is the appropriate standard for allowing railroad workers to recover for emotional distress due to negligently inflicted toxic exposure?

Given the policies informing the FELA and the common law, what is the appropriate standard for allowing railroad workers to recover for medical monitoring due to negligently inflicted toxic exposure?

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STATEMENT OF THE CASE

This case concerns the "Snowmen of Grand Central Terminal," a limited set of railroad workers who were exposed to asbestos insulation while working in Grand Central Terminal (GCT) during the late 1980s. They were called Snowmen because after finishing their work in the tunnels beneath GCT, they would emerge covered from head to toe with white pipe insulation dust. Although the defendant Metro-North Commuter Railroad knew the insulation contained carcinogenic asbestos, for years the Railroad ordered them to perform such work without warning them they actually were handling asbestos and without providing them with any protection against the asbestos.

The plaintiff Michael Buckley is one of those Snowmen. From June of 1985 to June of 1988 the Railroad exposed him to massive amounts of asbestos on a daily basis in violation of OSHA regulations designed to prevent employers from subjecting their workers to such exposure. This action was brought to provide the Snowmen with appropriate medical monitoring and an opportunity to obtain just compensation for the Railroad's negligent infliction of emotional distress (NIED).[1]

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[1] This case does not involve an "increased risk of cancer" claim (which requires a probability of future cancer for recovery); rather, Buckley's emotional distress constitutes an "increased fear of future cancer" claim, which is a present injury consisting of mental anxiety and distress over contracting cancer in the future and does not require a probability of future cancer. *Buckley v. Metro-North Commuter R.R.*, 79 F.3d 1337, 1343 n. 1. (CA2 1996).

1. Nature of Buckley's Asbestos Exposure

Michael Buckley is a pipefitter for Metro-North Commuter Railroad [JA 398]. He is married with a young son [JA 403]. He was born on May 22, 1954 and raised in Brooklyn in a family of four brothers and two sisters. He left high school after his sophomore year in order to earn money to help support his family, and began working on the railroad soon thereafter [JA 400-01; 404].

In June of 1985 Michael began working for Metro-North as a pipefitter in GCT. He was not given any safety training or protective equipment other than a hard hat and goggles [JA 406-07]. As a pipefitter he spent the majority of his time working in the network of steam tunnels under GCT that contained pipes covered with old insulation that in many areas was broken off and hanging down [JA 407-10; 615-16; Exhs. 2429; 4000; 4040]. Michael did demolition and renewal work on the steam pipes, changing valves, joints, and elbows [JA 411].

In order to perform the work he was assigned to do, it was necessary for Michael to disturb the pipe insulation [JA 412]. Metro-North told him the insulation he was working on was not asbestos [JA 409-10; 588].[2] He and his fellow pipefitters would stand under or next to the pipe being worked on, cut open the outer coating, and then hammer the insulation with a hand tool [JA 412-14]. The insulation material was dry, and would scatter all over and become airborne, "just like taking baby powder and shaking it." [JA 232-33; 413; 420;]. The dry asbestos dust filled the air and

[2] In early 1986 Metro-North's own asbestos consultant conducted a survey of asbestos in GCT, taking 150 samples of insulation material: of the 150 samples tested, 149 contained asbestos [JA 231-32; 615-16].

covered everything around them, including their hair, ears, nose, mouth, and clothing [JA 71-73; 413-15]. In an attempt to get some relief from the extreme dry heat in the tunnels, Michael and his co-workers would use fans to blow air onto their worksite, which would circulate the insulation dust even more [JA 421-22]. When he emerged from the tunnels after a job, he was covered from head to toe with white asbestos insulation dust, looking like a snowman [JA 72-73; 415-16]. Beginning in June of 1985, for nearly three years Michael averaged one hour per day of such direct physical contact with asbestos dust [JA 72; 231-32; 414-19].

From June of 1985 through June of 1988, Metro-North violated OSHA asbestos regulations by failing to provide Michael with a personal air monitoring device, which measures the amount of asbestos fibers in the air a worker is breathing [JA 247; 422-23; 447-49]. Nor did Metro-North measure the amount of asbestos fibers in the ambient air at any location and time when Michael actually was removing or handling asbestos insulation [JA 423-26; Exh. 0028]. Metro-North did not provide Michael with proper respirator protection until mid-1988 [JA 431-36; 589-90]. From June of 1985 through early September of 1987, Metro-North did not provide Michael with any asbestos protective clothing to wear while working with asbestos [JA 426-27]. He and his fellow workers wore street clothes while working with asbestos, and at times would walk through the public areas of GCT and go home on public transportation with asbestos dust all over their clothes [JA 427].

Buckley's asbestos work continued from 1985 to early 1988, at which point Metro-North contracted out the asbestos work to a outside firm rather than assign in-house employees such as Buckley to handle the asbestos insulation [JA 73; 540-41]. During the years Metro-North ordered Michael to handle and remove the asbestos insulation without any

training or protection, Metro-North paid Michael his regular wage rate of $10.00 per hour [JA 475]. The outside contractor's asbestos workers were trained and licensed to safely handle and remove the asbestos, but cost Metro-North nearly four times as much per hour than did Mike and his fellow Snowmen [JA 628, Exhibit 1078 Metro-North Requisition confirming $37.00 per hour wage rate for qualified asbestos workers]. A reasonable inference as to why Metro-North knowingly exposed the Snowmen to the asbestos is that Metro-North wanted to save money by paying its own untrained workers a fraction of what it cost to pay for licensed asbestos workers to do the job safely.[3] And given the number of Snowmen involved and their daily work with the asbestos over a period of years, it is reasonable to infer that Metro-North saved a very substantial amount of money by willfully exposing its own untrained and unprotected workers to a known carcinogen.

2. Effect of Buckley's Asbestos Exposure

The experts who testified at trial, Dr. Steven Markowitz and Dr. William J. Nicholson, are leading experts in the field of asbestos-related occupational disease. Both are full professors at Mt. Sinai Medical School's preeminent Division of Environmental and Occupational Medicine and have extensive experience in the treatment and risk assessment[4] of asbestos diseases [JA 32-36; 42-48; 188; 208-12; 220-22]. Dr. Nicholson, for example, published the criteria document for asbestos on which the United States Environmental Protection Agency (EPA) relies, and he did the risk assessment on which the United States Occupational Health and Safety Administration (OSHA)'s 1986 and 1992 occupational asbestos exposure standards are based [JA 214-15; 217-19].

When a person inhales air containing asbestos fibers, the fibers form into a longitudinal arrangement parallel with the direction of the wind stream and are swept into the lungs' tubes and parenchyma, where they can become embedded in the tissue [JA 36-37; 63]. Fibers that accumulate in the lungs also can be carried to other parts of the body through the bloodstream or lymphatic system. When they become lodged in the alveoli or in the pleural lining of the lungs, they damage the lungs' ability to clean themselves by generating irritation and initiating a scarring process in the lung tissue [JA 64; 595-601]. Asbestos is a known carcinogen that is active in many sites in the human body, causing mesothelioma, lung cancer, esophagus cancer, stomach cancer, and colon cancer [JA 222-23]. Asbestos-related diseases can be entirely prevented by controlling the release of asbestos in the work place or by providing proper respiratory protection to prevent the inhalation of asbestos fibers [JA 67; 229; 187; 601].

Buckley was exposed to "enormously high" concentrations of airborne asbestos fibers "far in excess" of OSHA's Permissible Exposure Limit while working at GCT from June of 1985 to June of 1988 [JA 236-38; 247-48]. The asbestos fibers Buckley ingested have initiated harmful biological

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[3] The posture of this case is that this Court must consider the facts in the light most favorable to the plaintiff Michael Buckley, with all reasonable factual inferences being drawn in his favor, *Purgess v. Sharrock*, 33 F.3d 134, 140 (CA2 1994).

[4] Risk assessment is the process of using epidemiological data to establish a mathematical relationship between toxic exposures and the effect of those exposures on human beings. Risk assessment allows one to measure what the risk of developing an asbestos-related disease is in relation to a person's age, intensity of exposure, and duration of exposure [JA 214].

changes in his lungs, including the activation of macrophages which damage his lung tissue as they die and release enzymes while vainly attempting to detoxify the embedded asbestos fibers [JA 77-79; 182-87].

In the field of risk assessment, a one in 1,000 increased risk of dying is a "highly significant" increased risk that should be eliminated where possible [JA 239]. An increased risk of 1% (one in 100) is ten times greater than a "highly significant risk" and a risk of 5% (one in 20) is 50 times greater [JA 244]. OSHA considers an increased risk of death from asbestos exposure in the work place of even 1% to be "substantial" and an increased risk of death from asbestos exposure of 5% to be "totally unacceptable." [JA 217-18]. As a result of his asbestos exposure at GCT, Buckley has an increased risk of dying from cancer of between 1% to 5% [JA 85-87; 242-44], ranging between "substantial" and "totally unacceptable" and ten to 50 times greater than a "highly significant" increased risk. The experts confirmed Buckley has a reasonable scientific basis to fear developing asbestos-related cancer that will continue for the rest of his life [JA 85; 94; 135; 252-53]. As a result of his asbestos exposure, Buckley's total risk of dying from cancer now has increased by up to 25% [JA 293].

3. Medical Monitoring Damages

Clinical evidence of asbestos exposure does not begin to appear until at least 10 years after the first exposure [JA 201-02], and, not surprisingly, up to this point Buckley's clinical examinations and tests have been normal [JA 180-81]. However, it is now 10 years since Buckley's first exposure to asbestos at GCT, and Dr. Markowitz recommends that Buckley commence periodic medical surveillance to detect the earliest signs of scarring, lung cancer, and GI cancers, which can be beneficially treated with injections and surgery

if caught early enough [JA 91-92; 164-65; 168-89; 180-82]. The death rate from lung cancer is very high unless it is detected and treated in its earliest stages [JA 601]. The annualized cost for those asbestos examinations and tests is $950, and will continue for the rest of his life [JA 92-94]. Buckley's medical insurance coverage does not pay for any medical treatment related to on-the-job injuries or conditions, and as a result does not pay for his asbestos-related medical monitoring [JA 455-56]. Metro-North has not paid for his past medical monitoring expenses, which total $1,080 [JA 92; 462].

4. Buckley's Emotional Distress

As a result of Metro-North's negligent conduct,[5] Buckley suffers emotional distress in the form of anger, fear of the future, and loss of peace of mind. In Michael's words, "Once I found out about it, I was mad that all the years that we were doing it, that we were just now finding out it was asbestos. I was scared, I was upset, and I was angry at Metro-North." [JA 443]. He was scared because the films shown to him by Metro-North told him how a small amount of asbestos could kill him [JA 429-30; 443]. Michael expressed his concern and fear to: his various supervisors, the Metro-North Safety Department, the White Lung Association, and finally the Metropolitan Transit Authority (MTA) Inspector General's office, which investigates crime and corruption on Metro-North [JA 443-47; JA 634-35]. The Inspector General

[5] On the eve of trial, Metro-North admitted that part of its conduct had been negligent, and then moved to bar the plaintiff from referring to any of its negligent conduct during the trial. The trial court granted the Motion In Limine and prevented the plaintiff from referring to the Railroad's negligent conduct in order to establish the full basis and context of his NIED claim [JA 594; JA 5 Docket Item #39; JA 628 & 630].

conducted a joint investigation with the New York Attorney General and issued a Joint Report on September 19, 1989 regarding the Metro-North's handling of asbestos at GCT, which concluded Metro-North had engaged in "egregious" conduct that "seriously disregarded the health and safety of its workers" such as Buckley and his fellow Snowmen [JA 602-14]. In October 1989 the New York Department of Labor conducted an asbestos inspection of GCT and cited Metro-North for numerous OSHA asbestos violations (including failure to conduct required personal air monitoring and air testing) [JA 447-49]. The effect of these official reports was to make Michael even angrier: "I am working for a company who is supposed to protect you, their Safety Department is supposed to make sure you work in a safe area. And they are not. They weren't making sure that where I had to work was safe; that I wasn't going to die from asbestos or something else." [JA 449].

From August 1987 to September 1989, Metro-North refused Michael's request that he be medically tested for his asbestos exposure [JA 453]. In October of 1989 Metro-North sent Michael for an asbestos medical test at the Railroad Medical Department in GCT where a nurse did some tests but did not provide him with a copy of the results when he asked and refused to send him to a medical doctor [JA 453-55; 566-68; 591]. It was at that point Michael decided to retain a law firm to try to hold Metro-North accountable for what it had done to him [JA 456-58]. He wanted to be examined by a qualified asbestos doctor to find out exactly what his risk was, and his attorney gave him the name of the Mount Sinai Occupational Medicine Clinic in Manhattan, where he was given a thorough asbestos medical examination and informed he had an increased risk of developing asbestos-related disease [JA 459-62].

Living with the knowledge he has a significant increased risk of dying from cancer due to his asbestos exposure scares Michael: "I try not to think about my future but I am worried about it." [JA 470; 476]. He gets upset when he gets a pain in his chest, reads about asbestos exposure in the newspapers, or sees a news story about asbestos on TV [JA 470-71]. The fact he has a wife and a young son makes him worry he may not be alive to see his son grow up or graduate from school [JA 471; 476]. He works part-time for an ambulance company, and when he sees cancer patients, it makes him feel very bad: "I look at myself." [JA 471-72].

Michael has not gone to a psychiatrist regarding his asbestos exposure because he considers the degree of his worry about asbestos to be normal, not abnormal: "What is a psychiatrist going to do for me? What is he going to tell me? I am not going to die? Is he going to tell me not to worry about it?" [JA 472-73]. Nor has he asked for any prescription drugs as a result of his asbestos exposure: "What are drugs going to do for me? They are not going to take the asbestos away." [JA 473]. Dr. Markowitz discerned that Buckley was concerned about his asbestos exposure to an appropriate degree and he did not refer Buckley to a psychiatrist because Buckley's worry was not disproportionate to the real concern he should have over what happened to him [JA 206].[6]

His asbestos exposure has had a negative effect on Michael's temper and his relationship with his wife [JA 476-77]. He does not have much peace of mind as a result of his

[6] Michael began smoking as a teenager, and was in the habit of smoking less than a pack per day [JA 88]. However, since going to Mount Sinai he has decreased his smoking down to an average of one cigarette a day [JA 465-70], which is the equivalent of stopping smoking from a medical point of view and does not meaningfully increase his risk of contracting asbestos-related lung cancer [JA 88-91; 187].

asbestos exposure, and he feels bitter at work "when I think about what was done and what could have been prevented—what could have prevented this." [JA 475-78]. When asked what bothers him the most about Metro-North's conduct, Michael responded: "That it could have been so easily prevented with a little bit of training in the beginning and a little personal protective equipment." [JA 478]. When asked why he brought this lawsuit, Michael answered: "I wanted to make sure Metro-North be held accountable for what their people did to me." [JA 478].

Applying this Court's standard for FELA NIED claims—i.e., such claims may be brought by "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396, 2410 (1994)—the Second Circuit found Buckley has suffered a physical impact from the massive prolonged exposure to asbestos fibers both on his body and in the tissue of his lungs entitling him to recover for his reasonable emotional distress flowing from that physical impact [JA 640-41; 79 F.3d at 1343]. The Circuit Court also held that—in light of the evidence establishing the extent of Buckley's toxic exposure, his increased risk, and the value of monitoring--Buckley is entitled to a jury determination of his separate claim for the costs of medical monitoring [JA 648-51; 79 F.3d 1346-47].

SUMMARY OF ARGUMENT

The FELA is a humanitarian statute that must be liberally construed so as to fulfill its remedial purpose: namely, to promote safe operating conditions on the nation's railroads by holding railroads economically accountable for the injuries they negligently inflict on their workers. The genius of the FELA is that it converts railroads' economic self-

interest into a positive force for work place safety by giving railroads an economic incentive to provide work places free of known hazards to their employees' health. FELA jurisprudence is a unique form of federal common law whose overriding concern is to fulfill this remedial purpose of the Act. FELA jurisprudence gleans guidance from state common law in order to assist in the fulfillment of the FELA's underlying purpose, but state common law is not necessarily dispositive and must always be subservient to the primary goal of upholding the FELA's remedial purpose.

In the area of negligent infliction of emotional distress (NIED), one of the central concerns of state common law has been to restrict trivial, fraudulent, and unlimited claims, and this concern is expressed in a variety of tests or standards used to guarantee the genuineness of the NIED claim. The challenge in this case is to determine the standard for governing rail workers' NIED toxic exposure claims that will fulfill the paramount purpose of the FELA while also addressing the common law's concerns over restricting trivial, fraudulent, and unlimited claims.

Here, for a period of years during the late 1980s the defendant Metro-North negligently exposed the plaintiff Michael Buckley to massive amounts of asbestos (a known and regulated carcinogen) on a daily basis, thus measurably increasing his long term risk of death from asbestos-related cancer. In so doing, Metro-North saved a substantial amount of money because for all those years it paid Buckley and his fellow untrained and unprotected Snowmen only a fraction of what it would have cost to hire licensed asbestos removers to handle the asbestos safely. Unless the FELA holds railroads economically accountable for all the harmful effects of such negligent toxic exposure, railroads will have no meaningful economic incentive to avoid such conduct and the purpose of the FELA will be defeated.

The more restrictive common law "physical impact" test survives within the broader "zone of danger" test which this Court adopted in tne *Gottshall* case to govern FELA NIED claims. The physical impact test is the most appropriate common law test to apply to toxic exposure situations because one cannot have any significant toxic exposure without being actually physically impacted or contacted by the toxic substance. A plaintiff who satisfies the common law physical impact test is not required to show he has a "present physical injury" or "severe" emotional distress in order to recover for his resulting NIED. This is especially true in situations where the circumstances of the tortious conduct provide a guarantee of the genuineness of the NIED claim, such as where there is proof of significant toxic exposure or where the defendant breaches a direct duty to the plaintiff (both of which are present here).

There is no conflict between *Schweitzer* and *Buckley* because they address two entirely different types of claims: *Schweitzer* concerns pre-*Gottshall* FELA claims for clinically manifest asbestos disease whereas *Buckley* concerns a post-*Gottshall* FELA claim for NIED due to massive toxic exposure. *Buckley* is consistent with the existing body of FELA NIED toxic exposure cases, which holds that a FELA plaintiff who has sustained a physical impact with bodily harm due to negligently inflicted toxic exposure is entitled to recover for his reasonable fear of future toxic disease. *Buckley*'s four-prong standard for determining the recoverability of FELA NIED toxic exposure claims is a cautious adaptation of the common law's physical impact test which fulfills the purpose of the FELA while restricting trivial, fraudulent, and unlimited claims: it imposes a high threshold of expert proof confirming that a plaintiff has sustained enough actual physical impact with the particular

toxic substance to sustain a reasonable basis for fear of future toxic disease.

The common law always has allowed recovery for tortiously caused medical expenses, and allowing toxically exposed rail workers such as Buckley to recover damages for their medical monitoring costs honors that tradition while also holding railroads economically accountable for their negligent toxic exposure, thus fulfilling the paramount purpose of the FELA. The four-part *Paoli* test for recovery of medical monitoring claims establishes a sufficiently high burden of expert proof to restrict trivial, fraudulent, and unlimited claims while ensuring that rail workers with a legitimate basis to fear future cancer will receive the medical tests necessary to detect and beneficially treat the earliest signs of such cancers.

ARGUMENT

I. Given the policies informing the FELA and the common law, the appropriate standard for allowing railroad workers to recover for emotional distress due to negligently inflicted toxic exposure is a cautious adaptation of the "physical impact" test to the particular nature of toxic exposure.

A. The purpose and policy of the FELA

The first duty of this Court when deciding what type of claims are cognizable under the FELA is to "look to FELA itself, its purposes and background, and the construction we have given it over the years." *Gottshall,* 114 S.Ct. at 2403. The FELA is a remedial and humanitarian statute intended to be liberally interpreted so as to meet the changing conditions and concepts of industry's duties to its workers. *Urie v. Thompson*, 337 U.S. 163, 181-82, 191 (1949), *Kernan v.*

American Dredging Co., 355 U.S. 426, 431-43 (1958). The FELA seeks to adjust the cost of injury equitably between employee and employer, *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329 (1958), and to stimulate railroads to take measures for the prevention of injury to their employees and patrons, *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930). "Congress crafted a federal remedy that shifted part of the 'human overhead' of doing business from employees to their employers," *Gottshall,* 114 S.Ct. at 2404, and by imposing liability for injuries caused by the physical dangers of railroad work, the FELA "was meant to encourage employers to improve safety measures in order to avoid those claims." *Id.* at 2410. Prior to the enactment of the FELA in 1908, railroads had no economic incentive to provide safe working conditions for their employees because the law did not hold them economically accountable for the injurious consequences of those hazardous conditions. The genius of the FELA is that it converts railroads' economic self-interest into a positive force for work place safety by giving railroads an economic incentive to provide work places free of known hazards to the health and safety of their employees. In the words of one district court that extensively researched the legislative record: "the purpose and policy of Federal Employers' Liability Act legislation is to promote adequate recovery for negligently injured railroad workers and thereby promote safe operating conditions." *Kozar v. Chesapeake and Ohio Ry. Co.*, 320 F.Supp. 335, 387 (W.D.Mich. 1970), *aff'd in part and vacated in part on other grounds*, 449 F.2d 1238 (CA6 1971).[7] It is this two-fold purpose that is the essence of the statute. Indeed, without the protection of the

[7] *See generally* House Judiciary Com. Rep., H.R. Rep. No. 1386, 60th Cong., 1st Sess., 42 Cong. Rec. 4434 et seq (1908), S.Rep. No. 460, 60th Cong., 1st Sess. 2 (1908), and S.Rep. No. 432, 61st Cong., 2d Sess. 2 (1910).

FELA, railroad workers "are helpless to provide adequately for their own safety." *Sinkler,* 356 U.S. at 329.

In order to fulfill this overriding remedial purpose of the FELA, over the decades this Court has consistently interpreted the terms of the statute in a liberal and humanitarian fashion:

> On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. ... To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court.

Urie, 337 U.S. at 181. For example, in *Urie* this Court rejected the railroads' argument that the statutory term "injury" was limited to injuries caused by sudden trauma or accidents, holding that occupational diseases are compensable injuries under the FELA. *Id.* at 181, 186-67.

B. The role of state common law in FELA jurisprudence

FELA jurisprudence is a unique form of federal common law, and when deciding what claims are cognizable under the FELA, the common law's treatment of the right in question necessarily must be subservient to the Court's primary goal of upholding the FELA's remedial purpose and liberal course of construction. As this Court recognized in *Gottshall*, "common-law principles are not necessarily dispositive of questions arising under FELA," *Gottshall,* 114 S.Ct. at 2404,

but when the common law appropriately can be used to help fulfill the purpose of the FELA, "FELA jurisprudence gleans guidance from common-law developments." *Atchison, T. & S.F.R.Co.* v. *Buell,* 480 U.S. 557, 568 (1987). As Justice Souter stressed in his *Gottshall* concurrence, the Court's "duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law." *Gottshall,* 114 S.Ct. at 2412 [emphasis added].

As this Court acknowledged in *Gottshall*, "the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Id.* at 2411. These are valid concerns, and constitute a major theme among the common law jurisdictions. There is, however, considerable variation and dissonance in how that theme is expressed. The common law has never presented a monolithic or organized front in this area. *Id.* at 2418 (J.Ginsburg, dissenting). The challenge in a FELA case is not to mechanically apply a "general" common law rule or to seek out the lowest common law denominator. Rather, the challenge is to identify the common law most consistent with the remedial purpose of the FELA and that when applied in the spirit of this Court's evolving liberal interpretation of the statute will actually fulfill its fundamental purpose of maximizing railroads' economic incentive to provide a safe workplace. *Id.* at 2410 (this Court seeks to reconcile "the concerns of the common law with the principles underlying our FELA jurisprudence."). The policies informing the FELA are always paramount, and must not be subverted by a rigid application of particular common law rules.

Metro-North is asking this Court to apply the common law so as to defeat, rather than uphold, the purpose of the

FELA. Metro-North saved a substantial amount of money by paying its own untrained workers a fraction of the amount it cost to hire licensed workers to safely handle and remove the asbestos at GCT. Metro-North did so knowing the asbestos was there and knowing of the health hazards created by exposure to that carcinogen, in flagrant violation of its statutory duty under the FELA and OSHA. Now, Metro-North is asking this Court to apply the common law to allow it to walk away from the Snowmen without being held economically accountable for the medical monitoring costs and emotional distress generated by its misconduct. Surely, when a railroad massively exposes its workers to a known carcinogen in order to save money, no common law rule or policy should protect that railroad from being held fully accountable for all the consequences. The type of employer misconduct engaged in by Metro-North here simply cannot be rewarded by a civilized society, even in the rough and tumble setting of the railroad industry. "Compensation serves to deter negligent behavior." *Ayers* v. *Jackson Tp.*, 106 N.J. 557, 525 A.2d 287, 319 (N.J. 1987), citing to R. Posner, *Economic Analysis of Law* 142-43 (2nd ed. 1977).

Metro-North must not be allowed to use the common law to turn the clock back to pre-FELA days when railroads could save money by knowingly subjecting their employees to unsafe work places. Metro-North's argument in effect asks this Court to declare that railroads have the right to save substantial amounts of money by knowingly exposing their workers to hazardous amount of toxic substances without warning, training, or protection. Unless railroads are held economically accountable under the FELA for subjecting their workers to such toxic exposures, their economic incentive to provide a toxically safe work place will be eliminated, defeating the very purpose of the FELA.

As this case unfortunately illustrates, the criminal justice system is no deterrent to this type of corporate behavior, nor does OSHA provide any practical impediment. The FELA is the only line of defense railroad workers have against such conduct—it is their only meaningful protection from being placed in a situation where their employer railroad stands to save money by unsafely exposing them to toxic substances in their work place. The common law must not be used to create a temptation on the part of railroads to save money by having their workers handle a known carcinogen without warning or protection. Holding railroads economically accountable under the FELA for engaging in such misconduct is the most practical way to encourage them to resist that temptation.

It is not enough to say that the Snowmen can sue the Railroad when a fatal cancer surfaces 20 to 40 years in the future. By that time, witnesses will be dead or long gone, documents lost or destroyed, the railroad itself merged or bankrupt. To allow a railroad to wait and say to a man dying of cancer in these circumstances, "So sue me," is no real deterrent at all. When the large amounts of today's dollars Metro-North saved by knowingly exposing the Snowmen are invested over 40 years, the funds generated will more than make up for the prospect of uncertain future damages. And why should today's managers care when it will be someone else's problem to deal with in the distant future, especially when they are enjoying the immediate benefits of saving so much money in their current budgets?

The challenge in this case is to determine what standard for allowing railroad workers to recover for negligently inflicted toxic exposure will fulfill the FELA's purpose (by maximizing railroads' economic incentive to provide a safe workplace) while also addressing the common law's concerns regarding trivial, fraudulent, and unlimited claims.

If the FELA is to be rewritten so as to allow railroads to save money by providing a knowingly unsafe toxic workplace, then that is a legislative judgment for Congress—not the judiciary---to declare.

C. The "physical impact" test survives within *Gottshall's* "zone of danger" standard for FELA negligently inflicted emotional distress

Metro-North and its amici (including Conrail) argue that the common law "zone of danger" test adopted by this Court in *Gottshall* excludes the common law "physical impact" test, and thus bars FELA NIED cases based on toxic physical impact. This artful interpretation of the *Gottshall* standard is contrary to: the express language of *Gottshall,* the common law's application of the zone of danger test, and the reading of the courts that have applied the *Gottshall* standard to FELA cases. In fact, the physical impact test remains alive within *Gottshall's* zone of danger standard, and allows recovery for FELA NIED cases where an actual physical impact occurs.

This Court's description of the zone of danger test in *Gottshall* makes it clear that the more restrictive physical impact test is subsumed within the broader, more remedial zone of danger test. Relying on Professor Richard N. Pearson's leading article on NIED,[8] this Court defines the zone of danger test as follows: "the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical

[8] Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Distress—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477 (1982).

harm by that conduct." *Gottshall,* 114 S.Ct. at 2406. Because this zone of danger test "was less restrictive than the physical impact test," this Court found it to be consistent with the FELA's "broad remedial goals," "central focus on physical perils," and function of encouraging railroads to provide safe workplaces. *Id.* at 2410.

But in adopting the zone of danger test this Court did not abandon the physical impact test—on the contrary, this Court was careful to point out that "[t]he physical impact test, of course, would achieve many of the same ends as the zone of danger test. We see no reason, however, to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because of the fortuity that the impact did not occur." *Id.* at 2411. Obviously, when a plaintiff *does* "sustain a physical impact as a result of a defendant's negligent conduct," (rather than just being "placed in immediate risk of physical harm by that conduct"), the broader zone of danger test does not preclude the physically impacted plaintiff from recovery. *Id* at 2406. Because the facts of the *Gottshall* case did not concern a physical impact, this Court focused on when a plaintiff could recover in a pure zone of danger situation (i.e. being in a zone of danger where there is no physical impact involved). But merely because this Court directed comments to the specific fact situation at hand does not mean it excised the physical impact test from the zone of danger standard.

As the petitioner in *Gottshall*, Conrail made it emphatically clear that the zone of danger test includes the physical impact test within it ("when a railroad worker experiences a physical impact or reasonably fears the threat of a physical impact, the zone of danger test permits a recovery.") *Gottshall* Pet. Br. at p.36 (Docket # 92-1956). Indeed, Conrail stressed in its compilation of state common law tests for negligent infliction of emotional distress "that in

most instances the states that have adopted the more expansive tests also apply the more restrictive tests in appropriate circumstances." *Id.* at 45.[9] Plainly the common law zone of danger test presented by Conrail and adopted by this Court in *Gottshall* recognizes that the physical impact test survives within it. *See, e.g., Corgan v. Muchling*, 143 Ill.2d 296, 574 N.E.2d 602, 605 (Ill. 1991) (physical impact test still applies to direct victims whereas zone of danger test applies to bystanders who do not suffer any physical impact); *Kahle v. Glosser Brothers*, 462 F2d 815, 817 (CA3 1972) (zone of danger "supplemented and broadened, rather than replaced, the old 'impact' rule").[10]

Finally, all of the courts that have applied the *Gottshall* zone of danger test to FELA NIED cases have recognized that the physical impact test remains a viable element of the *Gottshall* zone of danger test. *Bloom* v. *Consolidated Rail Corp.*, 41 F.3d 911, 914-15, 916 (CA3 1994) ("Under the zone of danger test announced by the Court in *Gottshall*, [the railroad] has a legal duty if [the plaintiff] sustained a physical impact."); *Gottshall* v. *Consolidated Rail Corp.*, 56 F.3d 530, 534-35 (CA3 1995), *on remand* (no recovery because plaintiff Gottshall did not suffer a physical impact, threat of physical impact, or immediate risk of physical harm); *Marchica v. Long Island R.R Co.*, 31 F.3d 1197, 1203 (CA2 1994); *Buckley*, 79 F.3d at 1343; *Marschand v. Norfolk &*

[9] *See also id.* at pgs. 11 ("recovery for negligent infliction of emotional distress under the FELA should be limited to situations that satisfy the common law threshold requirement that the plaintiff either experience an actual physical impact or reasonably fear the threat of a physical impact."), 35, and 38.

[10] In his amicus curiae brief on behalf of the RLEA, Professor Richard N. Pearson confirms the zone of danger test did not eliminate the physical impact test, and demonstrates the lack of foundation for Metro-North's interpretation of the *Gottshall* zone of danger test.

Western Ry. Co., 81 F.3d 714, 715 (CA7 1996); and *Dennis v. Conrail*, 1994 US Dist LEXIS 12710 at n.12 (E.D.Pa. 1994).

D. The physical impact test is the most appropriate common law test to apply to FELA toxic exposure cases

Any test governing negligently inflicted emotional distress resulting from toxic exposure must take into account the peculiar nature of toxic exposure claims. A claim for toxic exposure is by its very nature a "physical impact" claim. In order for there to be a reasonable basis for fear of a future toxic disease, there must be sufficient ingestion of the toxic substance into the plaintiff's body. And in order for the toxic substance to be ingested into the plaintiff's body, the plaintiff must have significant actual physical impact or contact with the toxic substance. In other words, a plaintiff cannot have a significant increased risk of toxic disease without actually being physically impacted by the toxic substance. The fact is, when it comes to toxic exposure claims, a near miss is indeed as good as a mile: since there can be no increased risk without significant toxic exposure, and no exposure without ingestion of the toxin into the body from physical impact or contact, a plaintiff who is merely within the zone of danger (and not physically impacted by the toxin) has no basis for recovery. Thus the pure zone of danger test (where the plaintiff is not physically impacted) does not apply to toxic exposure situations. Metro-North's attempt to have this Court apply such a pure zone of danger test to toxic exposure situations is nothing more than a labored attempt to exempt toxic exposure situations from FELA coverage.

E. Physical impact cases do not require a showing of a present physical injury or severe, physically manifest emotional distress, especially where the nature of the negligent conduct itself constitutes a guarantee of genuineness

1. At common law, physical impact cases do not require a showing of present physical injury or severe emotional distress, especially when bodily harm is present

At common law, once the plaintiff satisfied the requirement of a physical impact, no further showing of a present physical injury or severe emotional distress was required to recover damages for the emotional distress resulting from the physical impact. *See* Professor Richard N. Pearson's amicus curiae brief on behalf of the RLEA at pgs. 9-13. The requirement of a physical impact is the most restrictive common law test, and no other restrictions apply once the physical impact restriction is met. The very fact that physical impact occurred serves both to guarantee the genuineness of the claim and to limit the number of individuals who can sue. After reviewing the case law and the *Restatement (Second) of Torts*, the Second Circuit recognized that "emotional distress must be 'severe' only when a plaintiff has not suffered a physical impact. In such a case, the severity of the emotional distress serves to guarantee the genuineness of the claim." *Buckley*, 79 F.3d at 1346, citing case law.

The *Restatement (Second) of Torts* is a codification of the principles of the existing common law, and confirms that emotional distress resulting from a physical impact causing bodily harm is recoverable whether or not the distress is severe. The *Restatement* recognizes the basic principle of tort law that a victim of tortious conduct "is entitled to recover damages for past or prospective bodily harm and

emotional distress ... [and] reasonable medical and other expenses." *Restatement* § 924. The *Restatement* defines "bodily harm" as "any physical impairment of the condition of another's body, or physical pain or illness." *Id.* § 15. The definition of "impairment" is: "There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." *Id.* § 15 Comment a.

The facts in this case establish that Michael Buckley has suffered and will continue to suffer "bodily harm" within the meaning of the *Restatement*. Due to Metro-North's negligence, Buckley was exposed to massive amounts of asbestos fibers on a daily basis over a period of three years. That exposure has caused him to ingest massive amounts of carcinogenic asbestos fibers into his lungs. The asbestos fibers have impaled and become embedded in the tissue of his lungs, altering the structure of the tissue and setting in motion an irreversibly harmful biological process involving damaging macrophage activity. That is "bodily harm" within the definition of the *Restatement*. *See Sullivan* v. *Combustion Engineering*, 248 N.J.Super. 134, 590 A.2d 681, 683 (N.J.Super.A.D.), *cert. denied*, 126 N.J. 341, 598 A.2d 897 (1991).[11]

Given the fact Buckley has suffered "bodily harm" as a result of Metro-North's negligence, the Second Circuit correctly read § 436A of the *Restatement* as confirming his

[11] In the context of asbestos insurance coverage, courts recognize that the ingestion of asbestos fibers causes "bodily harm" even without a clinical disease. *See, e.g., J.H. France Refractories Co.* v. *Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502, 505-06 (Pa. 1993), and *Mitchell* v. *Maryland Casualty Co.*, 324 Md. 44, 595 A.2d 469, 472-73, 476-78 (1991).

right to recover for whatever reasonable emotional distress flows from that negligence. Section 436A states: "If the actor's conduct is negligent as creating an unreasonable risk of *causing either bodily harm or* emotional disturbance to another, and it results in such emotional disturbance alone, *without bodily harm* or other compensable damage, the actor is not liable for such emotional disturbance." [emphasis added]. Section 436A only applies to situations where there is no bodily harm caused by the negligent conduct (i.e., it only applies to instances where the negligent conduct does not cause initial bodily harm, but rather only causes emotional disturbance which itself does not generate any bodily harm). Where, as here, Metro-North's negligent conduct does produce "bodily harm," Metro-North is liable for all of Buckley's reasonable emotional distress flowing from that negligent conduct even if his emotional distress itself does not produce any additional bodily harm (i.e., even if his emotional distress does not produce any physically manifest injury or illness).[12]

2. The common law does not require a present physical injury or severe emotional distress where the circumstances of the tortious conduct constitute a guarantee of genuineness

[12] It is important to note that "severe emotional distress" does not necessarily have to result in any physically manifest bodily harm: "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed. ... In such cases the courts may perhaps tend to look for more in the way of outrage as a guarantee that the claim is genuine; but if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required." *Restatement (Second) of Torts* Section 46 Comments j and k.

Requiring a present physical injury is one common law device for helping to screen out fraudulent or trivial injuries. *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 925-26, 616 P.2d 813 (Cal. 1980). As with all such common law restrictive devices, however, the underlying purpose of the device is to provide a guarantee of the genuineness of the emotional distress. Accordingly, where there exists a guarantee of genuineness in the circumstances of the case, proof of a present physical injury is not necessary to recover for NIED. After discussing exceptions to the rule that mental disturbance must usually be accompanied by physical injury or illness, Prosser & Keaton conclude: "[w]hat all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious. ... Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery." W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 54 p. 362 (5th ed. 1984). In *Molien*, the California Supreme Court articulated the policy reasons for rejecting the physical injury requirement in favor of "some guarantee of genuineness in the circumstances of the case" as the "general standard of proof required to support a claim of mental distress." *Molien*, 27 Cal.3d at 930 (the physical injury requirement is both under and over inclusive, and encourages extravagant pleading and distorted testimony). *See also Potter v. Firestone Tire and Rubber Co*, 6 Cal.4th 965, 863 P.2d 795, 810 (Cal.1993) ("imposing a physical injury requirement represents an inherently flawed and inferior means of attempting to achieve" the goals of allowing recovery for legitimate toxic exposure claims while screening out unlimited claims).

The legitimacy of the circumstantial guarantee approach (as opposed to requiring a present physical injury) is

especially pronounced in toxic exposure cases, where courts have held that proof of exposure to toxic carcinogens sufficient to cause an increased risk of cancer is in itself a guard against feigned or trivial emotional distress claims. *Hagerty* v. *L & L Marine Services, Inc.*, 788 F.2d 315, 318, *modified*, 797 F.2d 256 (CA5 1986) ("The circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness."); *Plummer v. United States*, 580 F.2d 72, 76 (CA3 1978); *Day* v. *NLO*, 851 F.Supp. 869, 879 (S.D.Ohio 1994); *Marriott v. Sedco Forex Intl. Resources Ltd.*, 827 F.Supp. 59, 75-76 (D.Mass. 1993) (significant negligent exposure to a known carcinogen with significant increased risk of death from cancer is in itself a sufficient verification of the genuineness of the emotional distress); *Nesom* v. *Tri Hawk Intern.*, 985 F.2d 208, 211 (CA5 1993) (proof of toxic exposure constitutes special circumstance guaranteeing an emotional distress claim absent physical injury).

One circumstance the common law recognizes as guaranteeing the genuineness of the resulting emotional distress is when the defendant owes and breaches a direct duty to the plaintiff. Under those circumstances, recovery for the plaintiff's resulting emotional distress is allowed without a showing of physical injury or manifestation. *See, e.g., Jacoves v. United Merchandising Corp.*, 9 Cal.App.4th 88, 11 Cal.Rptr.2d 468, 488 (Cal.App. 2 Dist. 1992) ("Recovery for negligently inflicted emotional distress is possible where the defendant owes the plaintiff a direct duty and the plaintiff suffers emotional distress, even where there is no accompanying physical injury."); *Campbell v. A.C. Equipment Services Corp. Inc.*, 242 Ill.App.3d 707, 610 N.E.2d 745, 750 (Ill.App. 4 Dist. 1993): (in an employee asbestos exposure case, where a defendant employer knowingly breaches a duty to the plaintiff, emotional distress without physical manifestation is allowed), and *Gerardi* v.

Nuclear Utility Services, 149 Misc.2d 657, 566 N.Y.S.2d 1002, 1004-05 (Sup. 1991) (same); *Chizmar* v. *Mackie*, 896 P.2d 196, 203, 205 (Alaska 1995) (where the nature of the defendant's relationship to the plaintiff "imposes on the defendant a duty to refrain from conduct that would foreseeably result in emotional harm to the plaintiff, the plaintiff need not establish a physical injury in order to recover for the negligent infliction of emotional distress," nor must the emotional distress be medically diagnosable or objectifiable); *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993) (nature of parties' relationship gives rise to duty to refrain from activity which carries unreasonable and foreseeable risk of causing emotional or mental harm); *Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990) (exception to physical injury requirement exists where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm); *Mortise* v. *United States*, 1996 U.S.App. LEXIS 33508 at *9-*10 (CA2 Dec. 24, 1996).

When a defendant breaches such a direct duty, there are compelling policy reasons for relaxing the various common law restrictions on recovery of NIED. In the words of the California Supreme Court in the *Potter* case (which concerned a corporate landfill owner who improperly disposed of toxic wastes in order to save money, thus exposing adjacent landowners to carcinogens): "[w]hen a defendant acts with oppression, fraud or malice, no reason, policy or otherwise, justifies application of the more likely than not threshold. Any burden or consequence to society from imposing liability is offset by the deterrent impact of holding morally blameworthy defendants fully responsible for the damages they cause, including damage in the form of

emotional distress suffered by victims of the misconduct who reasonably fear future cancer." *Potter*, 863 P.2d at 817.[13]

Under both the FELA and OSHA, Metro-North owed a direct duty to Michael Buckley to provide him with a work place reasonably safe from known carcinogens such as asbestos. Metro-North breached that direct duty when for years -- in order to save money -- it knowingly ordered Michael to handle the asbestos insulation without any warning or protection. For years Metro-North assured the Snowmen they were in no danger from the pipe insulation when in fact Metro-North knew it was asbestos and knew of the health hazards posed by that carcinogen. As a result of Metro-North's egregious conduct, Buckley now has emotional distress in the form of a reasonable fear of future asbestos-related cancer, anger, and loss of peace of mind.

Under both the "circumstantial guarantee" and "breach of direct duty" common law exceptions, Buckley's detailed proof of the fraudulent and oppressive circumstances surrounding Metro-North's breach of its direct duty to protect him from a known carcinogen constitutes in itself a sufficient guarantee that his distress is genuine and reasonable rather than trivial or fraudulent. The common law's "physical injury" and "severe" distress restrictions do not apply here. Given its egregious conduct, Metro-North is not entitled to the protection of such common law restrictions, and the purpose of the FELA would be defeated to hold otherwise. As Justice Stevens noted in *Buell*, "whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the *nature of the injury* and

[13] Recovery based on such oppressive or fraudulent conduct is still grounded in negligence, as such conduct does not rise to the level of intentional infliction of emotional distress, which remains a separate and distinct cause of action. See *Potter*, 863 P.2d at 818-20.

the *character of the tortious activity*. ...broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." *Buell*, 480 U.S. at 568-70 [emphasis added]. Certainly the character of Metro-North's tortious activity must be taken into account here, as must the particular nature of Buckley's toxic exposure injury.

Metro-North's argument that Buckley's emotional distress is temporary, evanescent, and trivial is belied by the facts in the Record and by the nature of his toxic exposure. In effect, Metro-North has placed a ticking time bomb in Buckley's chest, a time bomb that may never go off but which he will have to live with for the rest of his life. The fact that Metro-North's negligence has condemned him to a lifelong vigil for an asbestos cancer to surface determines the nature of his emotional distress: anger over being subjected to what was a completely avoidable exposure, loss of peace of mind due to a reasonable fear of future cancer, and sense of outrage at being treated by his employer as if his life and well-being have no value. His understandable resulting distress is not temporary or evanescent or trivial, but has become a permanent part of this life.

F. *Buckley* is consistent with previous FELA toxic exposure negligent infliction of emotional distress cases

1. *Schweitzer* is not a FELA negligent infliction of emotional distress case, and does not control here

Schweitzer v. *Consolidated Rail Corp.*, 758 F.2d 936 (CA3), *cert. denied*, 474 U.S. 864 (1985), is a pre-*Gottshall* bankruptcy case that did not concern a FELA claim for NIED. Rather, the claims in *Schweitzer* were for clinically manifest asbestos diseases. The narrow issue actually decided by *Schweitzer* was "whether plaintiffs, who allege

that they were exposed to asbestos prior to their employer's [Bankruptcy Act] reorganization and did not manifest any injury until after the relevant consummation dates, had 'claims' that were discharged in the reorganization proceedings." *Schweitzer*, 758 F.2d at 941. Following the discovery rule applied to FELA occupational disease cases by *Urie*, the Third Circuit held that since claims for clinically manifest asbestos disease do not accrue until the disease is clinically manifested, the plaintiffs' claims were not discharged by the railroad's bankruptcy reorganization. *Id.* at 944 ("We conclude, therefore, that plaintiffs' future FELA causes of action were not dischargeable claims under § 77"). That is the proper narrow holding of the case.[14] Unfortunately, *Schweitzer* also has been cited for the unwarranted proposition that *any* FELA claim stemming from asbestos exposure does not come into existence until a clinical disease manifests itself.

Schweitzer did not involve or address FELA claims for the negligent infliction of emotional distress resulting from asbestos exposure. Indeed, it was not until nine years later that this Court in its landmark *Gottshall* decision first set forth the standard for FELA NIED claims. A post-*Gottshall* FELA claim for NIED is markedly different from a FELA claim for a clinically manifested asbestos disease. The NIED claim does not require any physical injury at all. In fact, that is what defines a FELA claim for NIED: it is a cause of action for emotional distress that accrues even though there is

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[14] See *Zulkowski* v. *Consolidated Rail Corp.*, 852 F.2d 73, 76 (CA3), *cert. denied*, 488 U.S. 994 (1988) ("Inasmuch as the employees in *Schweitzer* did not have manifest injuries prior to the reorganization, their claims could not have been discharged under section 77."); *Matter of Penn. Cent. Transp. Co.*, 71 F.3d 1113, 1115 (CA3 1995), *cert. denied*, 116 S.Ct. 1851 (1996); *Bocook* v. *Ashland Oil, Inc.*, 819 F.Supp. 530, 535 n.6 (S.D.W.Va. 1993).

no manifest physical injury. *Gottshall,* 114 S.Ct. at 2405. There is no conflict between *Buckley* and *Schweitzer* because they address two entirely different types of claims: a post-*Gottshall* FELA claim for the NIED due to massive toxic exposure is simply not a FELA claim for a clinically manifest asbestos disease. As a FELA negligently inflicted emotional distress claim, *Buckley* is governed by *Gottshall,* not *Schweitzer*.[15]

2. FELA toxic exposure negligent infliction of emotional distress cases support *Buckley*

FELA jurisprudence has the benefit of a developing body of FELA toxic exposure case law, beginning with the *Hagerty* case in 1986. The *Buckley* decision is fully consistent with the holdings of those FELA toxic exposure cases: where the evidence shows that a FELA plaintiff has sustained a physical impact due to negligently inflicted toxic exposure, that FELA plaintiff is entitled to recover emotional distress damages for his reasonable fear of future toxic disease.

The first FELA toxic exposure case involving fear of future cancer and medical monitoring is *Hagerty* v. *L. & L. Marine Services, Inc.*, 788 F.2d 315, 318, *modified*, 797 F.2d 256 (CA5 1986). When Hagerty's clothes and skin were

[15] Similarly, none of the FELA cases following *Schweitzer* involved a FELA claim for the NIED or for medical monitoring. *Batko* v. *Ogilvie*, 1986 WL 5761 (N.D.Ill) (arose out of a pre-*Gottshall* bankruptcy case); *Zulkowski*, 852 F.2d at 76 (a claim for asbestosis which did not become manifest until after the railroad's bankruptcy reorganization is not discharged by the bankruptcy); *In re Asbestos Products Liability Litigation (No. VI)*, 1996 WL 23986 (E.D.Pa.) (case dismissed without prejudice for failure of counsel to provide court-ordered basic information regarding extent of exposure and medical evidence). See also *Sullivan* 590 A.2d at 684, distinguishing *Schweitzer*.

drenched with a carcinogenic chemical, he suffered some trivial sensations but had no symptoms or manifestations related to cancer. However, he was aware of the carcinogenic effect of the chemical and when his doctor recommended he undergo periodic medical exams to monitor for signs of cancer, he became fearful of contracting cancer in the future. The Fifth Circuit rejected the defendant's argument that the physical injury requirement must apply to such fear of cancer claims to guard against unworthy claims. Noting that such a restriction also would deny worthy claims, the Court held that the circumstantial guarantee approach was the better device to differentiate worthy and unworthy toxic exposure claims: "a plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and causally related to the defendant's negligence. The circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness. It is for the jury to decide questions such as the existence, severity and reasonableness of the fear." *Id.* at 318.

Amendola v. Kansas City S.R. Co., 699 F.Supp. 1401 (W.D. Mo. 1988), involved a group of railroad workers who alleged they had come into contact with asbestos during their employment and who sought damages under the FELA for fear of contracting future asbestos-related diseases. After considering the policies underlying the FELA in light of the common law's concerns over restricting a flood of claims, the court found "that a claim under the FELA for emotional distress, negligently caused, must be accompanied by allegations of physical harm which either caused or was caused by the emotional distress." *Id.* at 1409. The court went on to conclude:

> The physical harm requirement is a necessary limitation on the ability to recover under the FELA

> for the fear of contracting asbestos-related diseases. This requirement will serve to limit trivial, frivolous or premature claims. The Court has declined to adopt the strictest variation of the tort of negligent infliction of emotional distress which requires a physical injury as a *precondition* to recovery for emotional distress. The rule adopted by the Court is a moderate rule which will allow plaintiffs to pursue meritorious claims under the FELA for the negligent infliction of emotional distress while keeping the floodgates intact. The plaintiffs in this action have not alleged physical harm either causing or caused by their fear of contracting asbestos-related diseases. Thus, plaintiffs fail to state a claim upon which relief may be granted under the FELA.

Id. at 1411. The court carefully distinguished between "physical injury," which is *not* a precondition for a FELA fear of future asbestos cancer claim, and some "physical harm" either causing or caused by the fear of future asbestos disease, which is a requirement. When used in opposition to the term "physical injury," the term "physical harm" is synonymous with the *Restatement's* "bodily harm." As discussed above, there is "bodily harm" whenever "the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." *Restatement* at § 15 Comment a. Here, Michael Buckley proved he has suffered bodily harm in the form of harmful alterations to the tissue of his lungs which in turn has caused his emotional distress. *Amendola* confirms he does not have to establish a "physical injury" as a precondition to recover NIED damages under the FELA for his fear of developing future asbestos-related disease.[16]

[16]The district court in this case recognized *Amendola's* distinction between physical injury and physical harm when deciding the Railroad's Motion to Dismiss in 1990, *Giammona* v. *Metro-North Commuter R.R.*, 750 F.Supp. 662, 664 (S.D.N.Y. 1990) (rejecting a requirement of a physical injury, the court held "we find that the allegation that plaintiff has suffered a detrimental physical change in his body tissue would, if substantiated, be sufficient to support recovery for emotional harm under FELA").

In *Marriott* v. *Sedco Forex Intl.Resources*, 827 F.Supp. 59 (D.Mass 1993), the plaintiff's employer inoculated him with a hepatitis vaccine taken from a batch later determined to be contaminated with HIV, the virus which causes AIDS. The plaintiff did not test positive for AIDS but suffered a purely emotional injury consisting of a fear of developing AIDS. He had no present physical injury and had no physical manifestation of his fear. He filed a Jones Act claim seeking recovery for his emotional distress, and the district court reviewed the common law jurisprudence in light of the policies underlying FELA emotional distress claims. The court held that the plaintiff was entitled to recover damages under the FELA for his fear of future AIDS disease even though his emotional distress was not manifested in the form of physical injury or illness, noting: "If a claim can be tied to a distinct event which could cause a reasonable person to develop a fear of contracting a disease like AIDS, there is a guarantee of genuineness of the claim." *Id.* at 75. The court concluded, "due to the clear-cut and egregious manner of [the plaintiff's] exposure, it seems beyond peradventure that [the plaintiff] reasonably suffered genuine emotional distress." *Id.* at 75-76.

Marchica v. *Long Island R. Co.*, 31 F.3d 1197 (CA2 1994), is the first post-*Gottshall* FELA toxic exposure NIED case. *Marchica* involved a plaintiff whose hand was pricked by a discarded hypodermic needle. There was no proof he actually was exposed to the HIV virus, but the prick occurred

under circumstances that could cause a reasonable person to develop a fear of AIDS. The Second Circuit found the plaintiff satisfied the *Gottshall* test: "Because he suffered a physical impact, Marchica is entitled to receive compensation for all injuries—physical and emotional—proximately caused by the physical impact." *Id.* at 1203. After reviewing the common law fear of future disease cases, the Second Circuit concluded: "[w]e adopt the approach of those cases just discussed which take a more flexible view because they are most consistent with FELA's remedial nature. Thus, a FELA plaintiff who has suffered a physical impact may recover for fear of developing AIDS if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of AIDS." *Id.* at 1206.

Buckley is the only other post-*Gottshall* FELA toxic exposure NIED case. The Second Circuit found that Buckley's massive exposure to asbestos fibers on a daily basis for three years (which has caused harmful changes in his lung tissue) constitutes a physical impact that would lead a reasonable person to fear asbestos-related cancer. The Court stressed that in a FELA toxic exposure case, "the relevant inquiry is whether the impact would cause fear in a reasonable person. To make this determination, a jury must take into account the nature of the toxic substance, its method of transmission into the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body." *Buckley,* 79 F.3d at 1344. The Second Circuit was well aware of the common law's concerns, but expressly declined to impose a "physical injury" or "severe" emotional distress requirement in a FELA toxic exposure case where there has been actual physical impact with the toxic substance under circumstances that would lead a reasonable person to fear developing a future toxic disease. *Id.* at 1344-46.

The *Buckley* decision is fully consistent with the developing body of FELA toxic exposure NIED case law. Striking an appropriate balance between upholding the humanitarian purpose of the FELA and addressing the common law's concerns over trivial and fraudulent claims, this body of case law: allows recovery where there is a toxic physical impact with some bodily harm; declines to impose a "physical injury" or "severe" distress requirement in FELA toxic exposure NIED claims and instead adopts the circumstantial guarantee approach for supplying the indicia of genuineness; and leaves the reasonableness and severity of the plaintiff's fear of the future as questions for the FELA jury to decide. As discussed above, the circumstantial guarantee approach to establishing genuineness is especially appropriate for toxic exposure cases. To paraphrase the *Marchica* court's articulation of the circumstantial guarantee test for FELA toxic exposure claims: "Thus, a FELA plaintiff who has suffered a physical impact may recover for fear of developing [a toxic disease] if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of [the toxic disease]." *Marchica,* 31 F.3d at 1206.

G. Given that the FELA is a remedial statute to be liberally interpreted so as to achieve its humanitarian purpose, the more remedial line of common law toxic exposure cases offers the most appropriate guidance here

1. Remedial common law toxic exposure cases

As discussed above, FELA jurisprudence must not be reduced to a contest to see which side can cite the greatest number of common law cases in support of any particular position. One can marshal common law citations to support virtually any proposition one can imagine. As Justice

Ginsburg noted, "there is no unitary common law governing claims for negligent infliction of emotional distress" for the common law of emotional distress "exists not in the singular, but emphatically in the plural." *Gottshall,* 114 S.Ct. at 2418 (J.Ginsburg, dissenting). Merely because a common law test may have substantial support does not necessarily mean it is appropriate to apply it in the context of the FELA if the result is to frustrate the humanitarian purpose of the Act. Thus, when a court looks to the common law for guidance while in the uncharted regions of the FELA, the polestar must always be those constellations of common law cases that will assist the court in achieving, not circumventing, the remedial purpose of the FELA.

With this in mind, a scan of the common law universe reveals a constellation of toxic exposure cases that provides the most appropriate remedial guidance for FELA fear of future toxic disease cases. For the convenience of the Court, an illustrative compilation of those cases is set forth in Appendix A broken down by category of toxic exposure: asbestos, contaminated water, radiation, and contact with chemicals or infectious agents. Those cases express the common law's more remedial nature, allowing recovery for NIED where there is a showing of toxic physical impact under circumstances that would cause a reasonable person to fear future toxic disease.[17]

[17] At pages 18-20 of its Brief, Metro-North discusses issues regarding claim-splitting and statutes of limitations that it admits were never raised or discussed at the trial court or circuit court levels, and which were not contained in the Petition for Certiorari's Questions Presented. Those issues are not properly before this Court. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) ("this Court does not decide questions not raised or involved in the lower court."); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980). Nevertheless, Metro-North ignores the fact that the original remedial "discovery rule" precedent for latent occupational diseases is this Court's FELA decision in *Urie* v. *Thompson*, 337 U.S. 163 (1949), holding that a FELA action for a manifested

2. The remedial line of common law cases is the most appropriate line to apply in the context of the FELA

The definition of "remedial" is: "Of the nature of a remedy; intended to remedy wrongs or abuses." *Black's Law Dictionary* (4th ed. 1968). The wrong and abuse that needs to be remedied here is very simple: Michael Buckley and his fellow railroad workers do not want to be placed in a position where their employer stands to save money by exposing them to toxic substances without warning, training, or protection, thereby measurably increasing their long-term risk of death and debilitating disease. The remedy they seek under the FELA is to hold the railroads economically accountable for such wrong and abusive conduct to the fullest extent the liberal and humanitarian tradition of FELA jurisprudence will allow. In so doing, the FELA will fulfill its purpose of making sure that the nation's railroads have a meaningful economic incentive to provide a safe work place reasonably free of hazards to the health and well-being of their workers.

Metro-North, however, is asking this Court to wield the common law as a sword to undercut the salutary purpose of the FELA. Through its restrictive invocation of the common law, Metro-North would have this Court largely suspend the remedial effect of the FELA in the area of toxic exposure. Metro-North is asking this Court to grant it dispensation to save substantial amounts of money by negligently exposing its workers to toxic substances, with the only economic deterrent being the distant prospect of a lawsuit filed some 20

occupational disease does not accrue until the plaintiff knew or should have known of the clinical manifestation. And the first FELA toxic exposure fear of cancer case properly recognized that the remedial "separate disease" rule for toxic cancers is most appropriate for FELA cases, *Hagerty,* 788 F.2d at 320-21.

to 40 years in the future by a former worker who is dying of cancer and whose access to the documents and witnesses necessary to prove his case will be severely impaired by the passage of time.

Metro-North seeks to achieve this result by urging that this Court incorporate into the FELA the most restrictive common law rules regarding recovery for NIED: no recovery without a present physical injury or without emotional distress so severe it results in a physical manifestation confirmed by medical or psychiatric testimony. But those restrictive rules are merely expressions of the common law's underlying concern that there be an indicia of genuineness to help guard against trivial, fraudulent, and unlimited claims for NIED. Not all common law jurisdictions require the imposition of those rules, especially where the circumstances of the tortious conduct provide a sufficient indicia of genuineness. Actual exposure to a known carcinogen that measurably increases a plaintiff's risk of dying of cancer provides such a circumstantial guarantee. A defendant's breach of a direct duty to the plaintiff is another type of circumstantial guarantee. A "present physical injury" or "severe" emotional distress is not required in those situations because the circumstances themselves satisfy the common law's concern for an indicia of genuineness and because the policy considerations tilt against the blameful defendant and in favor of the innocent victim.

Moreover, the fact Michael Buckley has suffered physical impact with bodily harm is in itself a sufficient guarantee of the genuineness of his distress to allow recovery under both traditional common law and FELA principles. Metro-North acknowledges this in a backhanded fashion by laboriously misreading *Gottshall's* zone of danger test to exclude the physical impact test, when in fact the physical impact test has always survived within the broader more liberal zone of

danger standard. And Metro-North's reliance on the most restrictive common law rules totally ignores the existing body of FELA toxic exposure cases, all of which refuse to frustrate the remedial purpose of the Act by incorporating the most restrictive common law rules into the jurisprudence of the FELA.

As the Second Circuit recognized in *Buckley*, there is an ample guarantee of genuineness in the circumstances of this case: Metro-North negligently exposed Michael Buckley to massive daily doses of asbestos for a period of years without warning or protecting him despite the fact Metro-North knew of the health hazards the carcinogenic asbestos posed. In so doing, Metro-North breached its direct legal duty to Michael under both the FELA and OSHA to provide him with a work place reasonably safe from exposure to known carcinogens. And as a result, Michael has a reasonable scientific and medical basis to fear his increased risk of dying from asbestos-related cancer. Under both prior FELA toxic exposure case law and the appropriate line of remedial common law, Michael Buckley is entitled to recover for his reasonable emotional distress generated by this type of tortious conduct.

H. *Buckley's* cautious adaptation of the physical impact test fulfills the purpose of the FELA while addressing the common law's concerns

The only post-*Gottshall* FELA toxic exposure case prior to *Buckley* was *Marchica*. *Marchica* makes it clear that the relevant inquiry in determining the genuineness of a FELA toxic exposure NIED claim is whether the toxic impact would cause fear in a reasonable person. Guided by this holding, the Second Circuit set forth a four-prong test for making that determination, namely, the jury must take into account (1) the nature of the toxic substance; (2) its method

of transmission into the body; (3) the extent of the exposure to the substance; and (4) how the disease develops in response to the presence of the toxic substance in the body. *Buckley,* 79 F.3d at 1344.

The application of this four-prong test enables the factfinder to determine whether the plaintiff's exposure was such as to establish a sufficient basis for fear in a reasonable person, and, if so, the extent of that fear. This test addresses the common law's concerns over restricting trivial, fraudulent, and unlimited claims by imposing a high threshold of expert proof on the plaintiff. The testimony of the plaintiff is not enough to recover because in order to satisfy each of the four prongs there must be competent scientific and medical testimony establishing the nature of the toxin, its method of transmission into the body, the extent of the plaintiff's exposure, and the effect of that exposure on the plaintiff. As the Second Circuit noted, "incidental" or "normal" contact with a toxin such as asbestos is not enough to satisfy this test. *Buckley,* 79 F.3d at 1344. There must be sufficient contact with the particular toxin to form a reasonable scientific basis for fear of developing a future toxic disease. The amount of that contact necessarily varies from substance to substance, but it is the plaintiff's heavy burden to prove by competent expert testimony each of these elements to the satisfaction of the trial court (as a prima facie matter) and to a jury at trial.

Michael Buckley clearly satisfies this test. He proved he has a significant measurable increase in his risk of dying from asbestos-related cancer due to his prolonged massive physical contact with asbestos fibers far in excess of OSHA's permissible limits. By contrast, a worker at GCT who merely had incidental contact with asbestos lacks a sufficient scientific basis to fear cancer and thus has no claim. By screening out such trivial exposures, *Buckley's* test limits

claims to situations where a plaintiff can prove he has a legitimate scientific basis to fear a future toxic disease due to significant toxic impact.

It must be stressed that the Second Circuit's test is actually a very cautious adaptation of the common law's physical impact test in the context of toxic exposure. Not just any physical impact, however slight, will allow recovery. On the contrary, the plaintiff can only recover if his physical impact with the toxic substance is so extensive that there is a reasonable scientific basis for him to fear developing a future toxic disease. To prove that, competent expert testimony is required. So the *Buckley* test actually is far more restrictive than the common law physical impact test, but the restrictions are appropriate in the context of FELA toxic exposure cases in order to satisfy the common law's legitimate concern over restricting trivial, fraudulent, and unlimited claims while still fulfilling the remedial purpose of the FELA.

II. Given the policies informing the FELA and the common law, the appropriate standard for allowing railroad workers to recover for medical monitoring due to negligently inflicted toxic exposure is the *Paoli* test

A. Common law acceptance of medical monitoring

Providing for the recovery of medical expenses flowing from tortious conduct always has been a central theme of the common law, and medical monitoring is a modern variation on that common law theme. It is an expression of the common law's developing response to the modern phenomenon of toxic exposure, and is fully consistent with the policies and purpose underlying the FELA.

The seminal medical monitoring case is *Friends For All Children, Inc.* v. *Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C.Cir. 1984). Noting that the *Restatement (Second) of Torts* defines "injury" as an "invasion of any legally protected interest of another," *Restatement* at § 7, the D.C. Circuit Court concluded that "[i]t is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations." *Friends,* 746 F.2d at 826. It is hornbook law that a plaintiff may recover reasonable past and future medical expenses incurred as a result of any injury. *Buckley,* 79 F.3d at 1347, citing to C. McCormick, *Handbook on the Law of Damages* § 90 (1935). "The injury in a medical monitoring claim is the cost of the medical care that will, one hopes, detect" the anticipated harm. *In Re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 850 (CA3 1990), *cert. denied*, 499 U.S. 961 (1991) [*Paoli I*]. Recognition of the need for medical monitoring damages "does not create a new tort," it "is simply a compensable item of damage when liability is established under traditional tort theories of recovery." *Potter,* 863 P.2d at 823.

A review of common law jurisdictions reveals that, in addition to FELA jurisprudence (*Hagerty* and *Buckley*), there are 19 jurisdictions that allow damages for medical monitoring costs in the absence of a physical injury, and four jurisdictions that require a showing of a physical injury in order to recover medical monitoring damages. For the convenience of the Court, a compilation of these jurisdictions is set forth in Appendix B.

B. Purpose and policy of medical monitoring

There are forceful public policy reasons impelling the spread of the common law rule allowing recovery for medical monitoring in toxic exposure cases without proof of present physical injury. These policy reasons are: (1) an important public health interest in fostering access to medical testing in order to give toxically exposed individuals the benefit of early diagnosis, thus improving their prospects for treatment and minimizing their disability and death; (2) furthering the deterrent function of the tort system by compelling those who negligently expose others to toxic substances to bear the costs, thus maximizing economic incentive to avoid the irresponsible discharge of toxic substances; (3) reducing the overall costs to defendants and society by preventing or mitigating serious future illness caused by negligent toxic exposures; (4) avoiding the elemental injustice of forcing economically disadvantaged individuals who have been wrongfully exposed to dangerous toxins to bear the cost of medical surveillance necessitated by another's negligence; and (5) furthering the equitable efficiency of the legal system by enabling the plaintiff to establish the causal connection between the defendant's tortious conduct and the harmful toxic exposure at an early stage when the details of proof are most readily available (as opposed to decades later when the elements of proof have been severely degraded by the passage of time). *Potter,* 863 P.2d at 824; *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 976 (Utah 1993), *cert. denied*, 115 S.Ct. 1253 (1995); *Ayers*, 525 A.2d at 311-12.

C. Elements of proof for a medical monitoring claim

To recover medical monitoring costs, a plaintiff must show by competent medical proof that he or she has a significant increased risk (but not necessarily a probability)

of future disease which warrants medical surveillance in order to detect and beneficially treat the earliest clinical signs of the disease. *Paoli I,* 916 F.2d at 851; *Hansen, supra,* at 979; *Potter, supra,* at 824. Courts have articulated various tests for recovering medical monitoring damages, but the essential elements of proof remain the same. *Ayers, supra,* 312; *Paoli I, supra,* at 852 and *Paoli II,* 35 F.3d 717, 787-88 (CA3 1994), *cert. denied*, 115 S.Ct. 1253 (1995); *Hansen, supra,* at 979-80; *Potter, supra,* at 824-25. The test set forth in the *Paoli* cases has been relied on by most of the medical monitoring cases. *See* Appendix B. It is a straightforward recitation of the essential elements of proof necessary for establishing the legitimacy of such a claim, and is consistent with the policy concerns underlying both the FELA and common law. Those elements of proof are:

1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.

2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.

3. That increased risk makes periodic diagnostic medical examinations and testing (beyond the ones that would have been prescribed for the plaintiff in the absence of the particular toxic exposure) reasonably necessary.[18]

4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

[18] For example, medical monitoring for a preexisting condition would not be included, unless the toxic exposure caused an increase in or different type of medical monitoring for that preexisting condition. *Potter,* 863 P.2d at 825 n.27.

Paoli II, 35 F.3d at 787-88, incorporating *Hansen's* standard; *Buckley,* 79 F.3d at 1347. These elements must be proven by competent expert testimony. *Ayers,* 525 A.2d at 312; *Paoli I,* 916 F.2d at 852.

Courts recognize that "no particular level of quantification is necessary to satisfy" the requirements of "significant exposure" and "significant increased risk." *Hansen,* 858 P.2d at 979. In order to establish significant increased risk, "the plaintiff must prove that the exposure was of sufficient intensity and/or duration to increase his or her risk of the anticipated harm significantly over the plaintiff's risk prior to exposure." *Id.* at 979. Significant exposure "refers to an exposure which, either by duration or harm, is sufficient to cause a significant increased risk, which in turn is sufficient to require a monitoring regime different from that normally required in the absence of such an exposure." *Redland Soccer Club* v. *Dept. of Army of U.S.,* 55 F.3d 827, 846 (CA3 1995), *cert. denied,* 116 S.Ct. 772 (1996). Depending on the nature of the toxic substance and extent of exposure, OSHA or EPA standards may be of some assistance, but ultimately "it is for the trier of fact to decide, on the basis of competent medical testimony, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring." *Potter,* 863 P.2d at 825.

D. The *Paoli* test fulfills the purpose of the FELA while addressing the common law's concerns

The *Paoli* test fulfills the purpose of the FELA by holding railroads economically accountable for their negligent toxic exposure, thus providing an incentive to avoid such exposures in the work place. Without the deterrent effect of such damages, railroads will be in a position to save money by ordering their untrained and

unknowing workers to handle toxic substances at below-market cost, defeating the purpose of the FELA.

The *Paoli* test addresses the common law's concerns by restricting trivial, fraudulent, and unlimited claims. Courts flatly reject the argument that allowing damages for medical monitoring without requiring a present injury or particular level of quantified increased risk will open the floodgates for such claims: *Paoli I,* 916 F.2d at 788 (plaintiffs not likely to desire additional medical tests unless they are really needed, amount of damages not high enough to provoke flood of litigation); *Potter,* 863 P.2d at 825 (the elements of proof provide a "substantial evidentiary burden," only monitoring costs beyond usual regime are recoverable, amount of costs is not speculative because they are based on specific dollar costs for recognized medical examinations); *Hansen,* 858 P.2d at 978 & 981 (elements of proof "prevent unnecessary litigation and unwarranted recoveries," as only "reasonable and necessary" costs will be compensated); *Day* v. *NLO*, 851 F.Supp. at 880 ("courts concerns over damages which are uncertain, speculative, or conjectural are overcome by the reasonableness of compensation for diagnostic tests in cases where liability has been established. ... the reasonableness of the tests is one the court can adequately adjudicate in light of expert testimony, with minimal risks of uncertain, speculative or conjectural recoveries."). In the words of one court that adopted the *Paoli* test, requiring proof of those elements "should remove the questions of the existence of an injury and the need for medical testing from the realm of speculation and also limit the availability of the remedy to a determinable universe of plaintiffs." *Bocook v. Ashland Oil Inc.*, 819 F.Supp. 530, 537 (S.D.W.Va. 1993).

E. Buckley is entitled to a jury determination of his claim for medical monitoring damages

The evidence in this case establishes that Michael Buckley is entitled to submit his claim for medical monitoring costs to a jury. The question is not whether it is probable that Buckley will develop an asbestos-related cancer in the future, but rather whether medical monitoring is reasonably necessary in order to diagnose and treat the early signs of such cancers. *Buckley,* 79 F.3d at 1347. As the Second Circuit found, given the reliable expert testimony demonstrating the massive extent of his exposure, the significance of his increased risk, the seriousness of the cancers for which he is at risk, and the reasonable medical necessity for his monitoring, a reasonable jury could award him medical monitoring costs. He is entitled to a jury determination of his damages, especially since this is a FELA case where "the right of the jury to decide the issue of causation must be 'most liberally viewed,'" with the standard being whether Metro-North's negligence played any part, no matter how slight, in causing his injury. *Marchica,* 31 F.3d at 1207, citing to *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957).

Metro-North must be held liable for Michael Buckley's medical monitoring costs if the purpose of the FELA is to be upheld. If, as a matter of federal common law, this Court declares that railroads cannot be held liable under the FELA for the medical monitoring costs they negligently inflict on their workers, then the function of the FELA in creating and maintaining an economic incentive to provide a reasonably safe work place will be thwarted. Indeed, such an exemption from FELA accountability will have the perverse effect of creating an economic incentive on the part of railroads to save money by exposing their workers to toxic substances without telling them, training them, or protecting them. The

remote prospect of facing a law suit in 20 to 40 years when the plaintiff is disadvantaged both by a fatal cancer and the absence of vital documents and witnesses, is simply not enough of a deterrent to check such misconduct.

Michael's health insurance does not cover employment-related asbestos medical expenses, and unless Metro-North is held accountable he will be forced either to personally bear the lifelong economic burden of tests caused by Metro-North's egregious conduct, or to forgo those reasonably necessary medical tests with the attendant risk that he will not receive any treatment until a cancer becomes unstoppably full blown. The last question Michael answered on direct examination was: "Why did you bring this lawsuit, Mr. Buckley?" His answer was: "I wanted to make sure Metro-North be held accountable for what their people did to me." [JA 478]. Releasing Metro-North from accountability under the FELA for such conduct would be a denial of elementary justice that would only serve to weaken the FELA while further victimizing Michael and his fellow Snowmen.

CONCLUSION

The Second Circuit's decision below should be affirmed, with the case remanded for a retrial.

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APPENDICES

APPENDIX A

REMEDIAL COMMON LAW TOXIC EXPOSURE CASES

Asbestos: recovery for emotional distress allowed based on significant exposure to asbestos where there is no clinically diagnosed disease or injury present or where there are only aymptomatic asbestos-induced changes present in the lung tissue:

Watkins v. Fibreboard Corp., 994 F.2d 253, 259 (CA5 1993);

Campbell v. *A.C. Equipment Services*, 242 Ill.App.3d 707, 610 N.E.2d 745, 750 (Ill.App.4 Dist.1993);

Gerardi v. *Nuclear Utility Services*, 149 Misc.2d 657, 566 N.Y.S.2d 1002, 1004-05 (Sup. 1991);

Lavelle v. Owens-Corning Fiberglass Corp., 30 Ohio Misc.2d 11, 507 N.E.2d 476, 480-81 (Ohio Com. Pl. 1987);

In re Moorenovich, 634 F.Supp. 634, 637 (D.Me. 1986);

Herber v. Johns-Manville Corp., 785 F.2d 79, 85 (CA3 1986);

Mauro v. *Owens-Corning Fiberglass Corp.*, 225 N.J.Super. 196, 542 A.2d 16, 23-24 (N.J. Super. A.D. 1988), *aff'd sub nom, Mauro* v. *Raymark Industries, Inc.*, 116 N.J. 126, 561 A.2d 257 (1989);

Sullivan v. Combustion Eng., 248 N.J.Super. 134, 590 A.2d 681, 685 (N.J.Super.A.D.), *cert. denied*, 126 N.J. 341, 598 A.2d 897 (1991).

Contaminated Water: ingestion with subcellular harm sufficient basis for recovery of emotional distress:

Werlein v. United States, 746 F.Supp. 887, 901, 906 (D.Minn. 1990);

Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1205-06 (CA6 1988);

Merry v. Westinghouse Electric Corp., 684 F.Supp. 847, 852 (M.D. Pa. 1988);

Anderson v. W.R. Grace & Co., 628 F.Supp. 1219, 1226-28 (D. Mass. 1986);

Wilson v. Key Tronic Corp., 40 Wash.App. 802, 701 P.2d 518, 524 (Wash. App. 1985);

Laxton v. Orkin Exterminating Co., Inc., 639 S.W.2d 431, 433-34 (Tenn. 1982).

Radiation: exposure to excess doses with subcellular harm sufficient basis for recovery of emotional distress:

Day v. NLO, 851 F.Supp. 869, 877-79 (S.D.Ohio 1994);

Brafford v. Susquehanna Corp., 586 F.Supp. 14, 17-18 (D.Colo. 1984).

Contact With Chemical Or Infectious Agent: physical contact causing increased risk of future disease sufficient basis for recovery of emotional distress:

Barth v. Firestone Tire & Rubber Co., 661 F.Supp. 193, 196 (N.D. Cal. 1987);

Clark v. *Taylor*, 710 F.2d 4, 14 (CA1 1983);

Wetherill v. University of Chicago, 565 F.Supp. 1553, 1559-60 (N.D. Ill. 1983);

Nesom v. *Tri Hawk Intern.*, 985 F.2d 208, 211 (CA5 1993);

Plummer v. United States, 580 F.2d 72, 75-76 (CA3 1978).

APPENDIX B

MEDICAL MONITORING ALLOWED WITHOUT PROOF OF PHYSICAL INJURY:

FELA FEDERAL COMMON LAW: *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, *modified*, 797 F.2d 256 (CA5 1986); *Buckley v. Metro-North Com. R.R.*, 79 F.3d 1337, 1346-47 (CA2 1996);

ALABAMA: Cain v. Armstrong World Indus., 785 F.Supp. 1448, 1451-52 (S.D.Ala. 1992);

ARIZONA: Burns v. Jaquays Mining Corp., 156 Ariz. 375, 377-80, 752 P.2d 28, 30-33 (Ariz.App. 1987), *review dismissed*, 162 Ariz. 186, 781 P.2d 1373 (1989);

CALIFORNIA: Potter v. Firestone Tire and Rubber Co., 6 Cal.4th 965, 863 P.2d 795, 822-23 (Cal. 1993); *Miranda* v. *Shell Oil Co.*, 17 Cal.App.4th 1651, 15 Cal.Rptr.2d 569 (Cal.App. 5 Dist. 1993);

COLORADO: Cook v. Rockwell Intern. Corp., 755 F.Supp. 1468, 1477 (D.Colo.1991);

DISTRICT OF COLUMBIA: Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 824-25 (D.C. Cir. 1984);

GUAM: Abuan v. General Elec. Co., 3 F.3d 329, 331 (CA9 1993), *cert. denied*, 510 U.S. 1116 (1992);

KANSAS: Burton v. R.J. Reynolds Tobacco Co., 884 F.Supp. 1515, 1523 n. 6 (D. Kan. 1995);

KENTUCKY: Bocook v. Ashland Oil, Inc., 819 F.Supp. 530, 536-37 (S.D.W.Va. 1993);

LOUISIANA: Johnson v. Armstrong Cork Co., 645 F.Supp. 764, 769 (W.D. La. 1986);

MICHIGAN: Meyerhoff v. Turner Construction Co., 210 Mich.App. 491, 534 N.W.2d 204, 206 (1995), *appeal denied*, 550 N.W.2d 535 (1996);

MINNESOTA: Werlein v. United States, 746 F.Supp. 887, 904-05 (D.Minn.1990), *vacated in part on other grounds*, 793 F.Supp. 898 (D.Minn.1992);

MISSOURI: Elam v. Alcolac, 765 S.W.2d 42, 209 (Mo.Ct.App.1988), *cert. denied*, 493 U.S. 817 (1989); *Thomas v. FAG Bearings Corp., Inc.*, 846 F.Supp. 1400, 1404 (W.D.Mo.1994);

NEW JERSEY: Ayers v. Jackson Tp., 106 N.J. 557, 525 A.2d 287, 311-13 (N.J. 1987);

NEW YORK: Gibbs v. E.I. DuPont, De Nemours & Co., Inc., 876 F.Supp. 475, 479 (W.D.N.Y. 1995); *Gerardi* v. *Nuclear Utility Services*, 149 Misc.2d 657, 566 N.Y.S.2d 1002, 1004-05 (Sup. 1991); *Askey* v. *Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242, 247 (A.D. 4 Dept. 1984);

OHIO: Day v. NLO, 851 F.Supp. 869, 879-81 (S.D.Ohio 1994);

PENNSYLVANIA: Simmons v. *Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232, 239 (Pa. 1996); *In re Paoli R.R. Yard PCB Litigation.*, 35 F.3d 717, 786-87 (CA3 Cir. 1994), *cert. denied*, 115 S.Ct. 1253 (1995) (*Paoli II*); *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 849-50 (CA3 1990), *cert. denied*, 499 U.S. 961 (1991) (*Paoli I*);

UTAH: Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993), *cert. denied*, 115 S.Ct. 1253 (1995);

VERMONT: Stead v. F.E. Myers Co., Div. of McNeil Corp., 785 F.Supp. 56, 57 (D.Vt.1990);

WASHINGTON: Hanford Nuclear Reserve, Litig., 780 F.Supp. 1551, 1562 (E.D.Wash. 1991);

MEDICAL MONITORING ALLOWED WITH PROOF OF PHYSICAL INJURY:

DELAWARE: Mergenthaler v. Asbestos Corp. of America, 480 A.2d 647, 651 (Del.Supr. 1984);

VIRGINIA: Ball v. Joy Technologies, Inc., 958 F.2d 36, 39 (CA4 1991) (West Virginia and Virginia law), *cert. denied*, 502 U.S. 1033 (1992);

VIRGIN ISLANDS: Purjet v. Hess Oil Virgin Islands Corp., 1986 WL 1200, at *4 (D.V.I. Jan. 8, 1996).